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Freedom from the Deprivation of Liberty: The Supreme Court Imposes Limitations on Indefinite Detention of Criminal Aliens—Zadvydas v. Davis

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FREEDOM FROM THE DEPRIVATION OF LIBERTY: THE SUPREME COURT IMPOSES LIMITATIONS ON INDEFINITE DETENTION OF CRIMINAL ALIENS— *ZADVYDAS v. DAVIS*

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I. INTRODUCTION

"Life, liberty, and the pursuit of happiness"[1]—this country is founded on the rights of the individual. As a nation of immigrants, these rights extend to all persons within the United States.[2] Kestutis Zadvydas and Kim Ho Ma are two of nearly 3,500 resident aliens who have committed crimes and served their sentences.[3] Subsequently ordered deported by the Attorney General, they have

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1. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

2. *See, e.g.,* Wong Wing v. United States, 163 U.S. 228, 238 (1896). *See infra* Part II.

3. Zadvydas v. Davis, 533 U.S. 678 (2001). *See also* Lourdes M. Guiribitey, Comment, *Criminal Aliens Facing Indefinite Detention Under INS: An Analysis of the Review Process*, 55 U. MIAMI L. REV. 275, 275-76 (2001) (discussing the review process available to the nearly 3,500 criminal aliens awaiting deportation).

been detained because their host nations refuse to accept them based on the lack of international agreements with the United States.[4] Claiming an infringement to their fundamental right to liberty, the aliens presented the Supreme Court with the constitutional issue of indefinite detainment.[5] Part II discusses both the common law and legislative history of 8 U.S.C. § 1231(a)(6), which authorizes the Attorney General to detain criminal aliens.[6] Part III discusses the majority and dissenting opinions in detail.[7] Part IV analyzes the Court's decision in light of constitutional demands and the ramifications of the decision,[8] and Part V concludes that the Court correctly interpreted the statute, but also notes that the recent terrorist attacks greatly influenced the implementation of the Court's decision.[9] Ultimately, the Court maintained liberty as an inherent fundamental right to United States residents.

II. DEPORTING ALIENS: HISTORY OF 8 U.S.C. § 1231(a)(6)

A. Common Law

In 1889, the Supreme Court held that the right to exclude aliens was "incident to every independent nation,"[10] and the government's right to exercise immigration power was free of constitutional limits.[11] As a result, the Court refused to intervene and deferred immigration decisions to other governmental branches.[12] This holding was extended in 1893 in *Fong Yue Ting v. United States*, to allow Congress the plenary authority to also deport resident aliens from the United States.[13] As a result, the powers to exclude and deport were classified as one and the same.[14] Three

4. *Zadvydas*, 533 U.S. 682-87.
5. *Id.* at 689.
6. *See infra* Parts II.A and II.B and accompanying notes.
7. *See infra* Parts III.B and III.C and accompanying notes.
8. *See infra* Part IV. and accompanying notes.
9. *See infra* Part V. and accompanying notes.
10. Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889).
11. *Id.* at 604-05.
12. *Id.* *See also* Victoria Cook Capitaine, *Life in Prison Without a Trial: The Indefinite Detention of Immigrants in the United States,* 79 TEX. L. REV. 769, 775 (2001).
13. 149 U.S. 698, 711-13 (1893).
14. *Id.* at 713. *See also* Marisel Acosta, *"Unremovable" Criminal Resident Aliens Awaiting Deportation: Can the INS Detain them Indefinitely?*, 73 TEMP. L. REV. 1363, 1370-71 (2000).

years later, however, the Supreme Court limited this holding by extending Fifth Amendment protections to every "person" in the United States, including aliens.[15] Ten years later, the government's power was further limited by *Yamataya v. Fisher*,[16] which held that aliens are guaranteed procedural Due Process.[17]

In 1952, the Supreme Court further addressed the government's power of alien detention. In *Carlson v. Landon*,[18] the Court held that the detention of aliens prior to deportation proceedings was justified if it served a legitimate governmental interest.[19] On the same day the Court also decided *Harisiades v. Shaughnessy*, in which deportation itself was challenged rather than detention.[20] These aliens believed that, as permanent resident aliens, they were entitled to the same Due Process rights as citizens, and thus they had the right to stay in the United States.[21] The Court ultimately concluded that Due Process could not be used as a shield to deportation because "it would unjustly deprive Congress of its power to protect the nation's welfare."[22]

In 1953, in *Shaughnessy v. United States ex rel. Mezei*, the Court specifically addressed the indefinite detention of excludable aliens.[23] The Court followed the entry fiction theory and drew a distinction between the rights afforded to excludable aliens and the rights afforded to deportable aliens.[24] Ultimately, the Court held

15. Wong Wing v. United States, 163 U.S. 228, 237-38 (1896) (discussing how government has the plenary power to remove resident aliens, but not the power to deprive constitutional protections while awaiting deportation).

16. 189 U.S. 86 (1903).

17. *Id.* at 100-01. The Court held the fundamental principle of Due Process included the right "that no person shall be deprived of his liberty without opportunity, at some time, to be heard . . . ." *Id.* at 101. In this case, however, the Court held that the alien seeking admission had been afforded procedural Due Process. *Id.* at 101-02.

18. 342 U.S. 524 (1952).

19. *Id.* at 541. This case was decided in an era of Communist threat and specifically dealt with the pre-hearing detention of alleged Communist aliens. Though these aliens were entitled to full procedural protection under *Yamataya*, the Court held that the governmental interest of protecting the public from Communist threat justified the detainment of these aliens. *Id.*

20. 342 U.S. 580 (1952).

21. *Id.* at 584.

22. *Id.* at 590-91. This case was also decided during the era of Communist threat, and these aliens were determined deportable as former members of the Communist party. Though the Court recognized that the deportation policy was severe, Congress could not be denied the power to protect the welfare of the United States. *Id.*

23. 345 U.S. 206 (1953).

24. *Id.* at 212-13. The Court stated:

that Mezei was an alien standing "on the threshold of initial entry,"[25] and that therefore continued detention by the Attorney General was in accordance with statutory authority.[26] Eventually, the Court continued to follow the entry fiction doctrine and differentiated the rights of excludable and deportable aliens.[27] The Court emphasized that an alien subject to a deportation order had substantive rights which are unavailable to an inadmissible alien.[28] This common law history affirmed the government's role of establishing immigration policy, while ensuring that it conformed to the standards set forth in the constitution.[29]

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in Due Process of law. But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is Due Process as far as an alien denied entry is concerned.

Id. at 212 (citations omitted). First established in *Mezei,* courts have labeled this theory "entry fiction." The entry fiction doctrine authorizes courts to treat an alien in an exclusion proceeding as if the alien had not gained admission to the United States. Therefore, the alien is not entitled to constitutional protections granted to those who are within the United States' boundaries. In contrast, deportable aliens are entitled to greater constitutional protections because they have already passed through the "threshold of entry." *E.g.,* Ma v. Reno, 208 F.3d 815, 822-23 (9th Cir. 2000). The INS also adopted this classification. These two categories helped the INS determine which procedures to follow, since less review is available to excludable aliens whereas deportable aliens are entitled to greater protection. In 1996 legislation renamed it the "theory of admission" and classified excludable aliens as "inadmissible" and deportable aliens as "removable." This reform legislation was intended to ultimately "purge" the United States of inadmissible aliens. Alexander Chopin, Comment, *Disappearing Due Process: The Case of Indefinitely Detained Permanent Residents' Retention of their Constitutional Entitlement Following a Deportation Order*, 49 EMORY L.J. 1261, 1267-69 (2000); *see also infra* Part II.B and accompanying notes.

25. *Mezei,* 345 U.S. at 212.

26. *Id.* at 210-11. *See generally* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 954-84 (1995) (discussing that both *Mezei* and *Knauff* (United States *ex rel.* Knauff v. Shaughnessy, 388 U.S. 537 (1950)) represent the "modern zenith of the plenary power doctrine," as the government has absolute authority with respect to exclusion matters).

27. Landon v. Plasencia, 459 U.S. 21 (1982).

28. *Id.* at 26.

29. *See generally* Acosta, *supra* note 14, at 1370-76 (discussing the U.S. Supreme Court common law history of immigration).

B. Legislative History

The Constitution grants Congress the authority to establish a "uniform rule of naturalization."[30] The Immigration and Naturalization Act (INA) governs the deportability of aliens, and has been frequently revised throughout its history.[31] In response to the influx of immigrants, Congress enacted the Immigration Act of 1917 to provide regulatory standards for immigration.[32] Under this Act, Congress established no time limit for effecting deportation, and thus aliens were detained until deportation was successful.[33] Congress amended this Act in 1952, and imposed a six-month time limit to detention following a final order of deportation.[34] This six-month time limit remained in effect until the 1990 amendment, which barred release of aggravated felons under a final order of deportation.[35] For the first time, the Attorney General had the statutory authority to indefinitely detain certain aliens.[36]

In 1996, Congress enacted the most sweeping changes to the INA. Fears of terrorism, job loss, and increasing crime figures encouraged the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA).[37] The AEDPA expanded the custodial authority of the Attorney General, repealing the 1952 statute that required the Attorney General to release criminal aliens.[38] It also eliminated judicial review previously available to deportable aliens, and authorized more restrictive detention provisions for deportable aliens.[39] However, harshly criticized for constitutional

30. U.S. CONST. art. I., § 8, cl. 4.

31. 8 U.S.C. §§ 1101-1537 (2001).

32. Immigration Act of 1917, Pub. L. No. 301, 39 Stat. 874 (1917) (codified as amended at 8 U.S.C. § 156 (1917)) (repealed 1952).

33. *Id.* § 19, 39 Stat. 889.

34. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 166 (amended 1990) (formerly 8 U.S.C. § 1252(c)(1952)). Case law further followed this strict interpretation, prohibiting detention of aliens beyond six months. Johns v. Dep't of Justice, 653 F.2d 884, 890 (5th Cir. 1981).

35. Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 5049 (amended 1996) (formerly 8 U.S.C. §1252(a)(2)(A) & (B) (Supp. II 1990)).

36. *Id.*

37. The Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter ADEPA]; Chopin, *supra* note 24, at 1276-78.

38. AEDPA (repealing INA § 242(a)(2)(b), 66 Stat. 208 (1952) (formerly 8 U.S.C. § 1252)).

39. *Id.*; *See also* Chopin *supra* note 24, at 1277.

defects,[40] it was again amended in 1996 under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[41] The IIRIRA restored the Attorney General's discretionary authority.[42] Eliminating mandated detention pending removal, the Act permitted the Attorney General to release criminal aliens who met specific statutory requirements.[43] Interpreting the statute, the INS imposed the burden upon the alien to demonstrate by clear and convincing evidence that she is not a threat to the community and is likely to comply with removal orders.[44] If the alien meets this burden, it is still within the Attorney General's discretion to grant release.[45]

These custody review procedures were further supplemented in 1999. The INS issued Interim Procedures regarding the implementation of 8 C.F.R. § 241.4, which accompanied 8 U.S.C. § 1231(a)(6), in a memorandum authored by Michael Pearson.[46]

40. Chopin, *supra* note 24, at 1279.

41. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter IIRIRA]. This amendment created 8 U.S.C. § 1231(a) by transferring the criminal alien detention provisions from 8 U.S.C. § 1252 (a)(2) (as amended by AEDPA). *See generally* Amy Langenfeld, Comment, *Living in Limbo: Mandatory Detention of Immigrants Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041, 1041-63 (1999) (discussing the IIRIRA and implications of the Act with respect to human rights, Due Process and the separation of powers).

42. IIRIRA, 110 Stat. at 3009-546.

43. 8 U.S.C. § 1231(a)(6) (Supp. V 1999). This statute outlined procedures for the INS to follow. Criminal aliens must be detained during removal hearings. *Id.* at §1231(a)(2). If an alien is ordered removed, the Attorney General has ninety days to effect deportation. *Id.* at §1231(a)(1)(A). If deportation is not immediately available, the INS has further review procedures. If removal is unsuccessful within ninety days, the aliens are generally released under the Attorney General's supervision. *Id.* at §1231 (a)(3). However, the Attorney General still retains the discretion to continue detention if it is determined that the alien is a risk to the community or unlikely to comply with removal orders. *Id.* As a result of this legislation, more criminal aliens are detained and deported by the INS than under previous statutes. Further, more aliens are indefinitely detained than before. M. Gavan Montague, Note, *Should Aliens be Indefinitely Detained Under 8 U.S.C. § 1231? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny*, 69 FORDHAM L. REV. 1439, 1444-45 (2001).

44. Chopin, *supra* note 24, at 1280.

45. *Id.* When using discretion to grant release, the Attorney General may evaluate the factors set forth in 8 C.F.R. § 241.4. These regulations were enacted to serve as a guide for the INS to invoke 8 U.S.C. § 1231(a)(6). 8 C.F.R. § 241.4. *See also* Chopin, *supra* note 24, at 1280.

46. Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, INS, United States Department of Justice, Detention Procedures for Aliens Whose Immediate Repatriation is Not

Entitled the "Pearson Memorandum," it established guidelines for INS district directors to consider when determining whether district directors should release aliens from custody.[47] Following the circuit court's decision in *Zadvydas v. Underdown*, the INS again issued a final rule establishing permanent, post order custody review procedures for detained aliens awaiting removal.[48] The purpose of this rule was to balance the need to protect the American public from dangerous aliens with the humanitarian concerns arising from another country's unjustified refusal to accept the return of its nationals.[49] Though the INS was hopeful that these procedures would remedy any constitutional invalidity, the Supreme Court's decision in *Zadvydas v. Davis*[50] would require another revision.[51]

Possible or Practicable (Feb. 3, 1999), *available at* http://www.ins.gov/graphics/lawsregs/handbook/detlong.pdf (last visited Oct. 31, 2001).

47. *Id.*; Elizabeth Larson Beyer, Comment, *A Right or Privilege: Constitutional Protection for Detained Deportable Aliens Refused Access or Return to Their Native Countries*, 35 WAKE FOREST L. REV. 1029, 1032-35 (2000). The Pearson Memo random provided for an automatic review before and after the ninety-day statutory removal period, and required mandatory review every six months to determine if a change in circumstances warranted release. The alien could only appeal a district director's discretionary decision to the Board of Immigration Appeals if the alien initiated the detention review by written request. Otherwise, discretionary detention could continue. Pearson, *supra* note 46.

48. 8 C.F.R. § 241.4.

49. *Id.* Detention of Aliens Ordered Removed, 65 Fed. Reg. 80,281 (Dec. 21, 2000). This rule establishes "permanent procedures" for post-order custody reviews, and aids the decision maker in determining whether a candidate is eligible for release from custody following the expiration of the removal period. *Id.* at 80,282. These procedures were modeled after 8 C.F.R. § 212.12 (pertaining to Mariel Cubans) and consist of records review, panel interview and recommendation opportunities, and a final decision by a separate Service Headquarters Unit (HQPDU). *Id. See also INS Issues Final Rule Establishing Custody Review Procedures for Detained Aliens,* 78 No. 2 INTERPRETER RELEASES 42 (Jan. 8, 2001).

50. 533 U.S. 678 (2001).

51. H.R. 2772, 107th Cong. (2001); Post-Order Custody Review after Zadvydas v. Davis, 66 Fed. Reg. 38,433 (July 24, 2001); 8 C.F.R. § 241.4 (incorporating amendments at 66 Fed. Reg. 56,976-77 (Nov. 14, 2001)); *see infra* Part IV. and accompanying notes.

III. THE *ZADVYDAS* DECISION

A. The Facts

In separate writs of certiorari, Kestutis Zadvydas appealed the Fifth Circuit Court of Appeals' decision authorizing his continued detainment by the Immigration and Naturalization Service (INS), and the Attorney General appealed a Ninth Circuit Court of Appeals' decision prohibiting the continued detention of Kim Ho Ma. For purposes of argument, the two cases were consolidated into one case for the United States Supreme Court to review.

Kestutis Zadvydas, a resident alien, was born to Lithuanian parents in a displaced persons camp in Germany in 1948.[52] At the age of eight, Zadvydas immigrated with his parents and other family members to the United States and has lived here ever since.[53] He has a long criminal record, including juvenile convictions for car theft and trespass, and convictions as an adult for attempted robbery, auto theft, attempted burglary, and drug crimes.[54] In addition, Zadvydas has a history of flight from both criminal and deportation proceedings.[55] In 1994, Zadvydas was ordered deported to Germany after being convicted for possession with the intent to distribute cocaine.[56]

Following the deportation order, Germany informed the INS that it would not accept Zadvydas because he was not a German citizen.[57] Lithuania also denied Zadvydas acceptance because he was neither a Lithuanian resident nor citizen.[58] In 1996, the INS asked the Dominican Republic to accept Zadvydas based on his wife's citizenship, which they declined.[59] Zadvydas then applied for Lithuanian citizenship based on his parents' citizenship, and at the time of the Supreme Court judgment, the reapplication was still pending.[60]

52. Zadvydas v. Davis, 533 U.S. 678, 684 (2001).
53. *Id.*
54. *Id.* His criminal record spans twenty-eight years (his first conviction was in 1966 and final conviction was in 1994). Zadvydas v. Caplinger, 986 F. Supp. 1011, 1014-15 (E.D. La. 1997).
55. *Zadvydas*, 533 U.S. at 684.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

Following the deportation order of 1994, the INS detained Zadvydas beyond the sanctioned removal period.[61] In September 1995, Zadvydas filed a writ of habeas corpus under 28 U.S.C. § 2241[62] challenging his continued detention as unconstitutional.[63] The magistrate denied Zadvydas' request for habeas corpus relief, and Zadvydas appealed to the District Court of the Eastern District of Louisiana.[64] The district court reversed the magistrate, holding that the indefinite detention of Zadvydas absent a reasonable likelihood of deportation violated his rights to substantive Due Process,[65] and that it was an "excessive means" of imposing the purposes of 8 U.S.C. § 1252.[66]

The INS appealed to the Fifth Circuit Court of Appeals, which reversed the district court.[67] It found two grounds by which the government may detain a resident alien: the danger posed to the

61. *Id.*

62. 28 U.S.C. § 2241 establishes federal court power to grant writs of habeas corpus. Section (c)(3) extends the right of habeas corpus to prisoners if they are held in violation of the Constitution of the United States. 28 U.S.C. § 2241(c)(3) (2001).

63. Zadvydas v. Caplinger, 986 F. Supp. 1011, 1015 (E.D. La. 1997). Zadvydas asserted that his continued detention was unconstitutional based on four main arguments, which the court rejected. *Id.* Magistrate Judge Moore held that Zadvydas was made aware of his constitutional rights, knowingly participated in his proceeding, and voluntarily waived his right to counsel. *Id.* Moore also held that the continued detainment did not violate international law, or Due Process, and further held the Attorney General exercised authority within his discretion. *Id.* Finally, the court concluded that the Eighth Amendment was not violated because the INS was continually attempting to effectuate deportation, rendering Zadvydas's continued detention not indefinite. *Id.*

64. *Id.* Zadvydas asserted that the magistrate erred in finding that the original proceeding comported with Due Process and in finding that continued detainment was constitutional. *Id.* at 1015. The district court interpreted Zadvydas's claim as presenting the question "whether a legal alien who is under final order of deportation may be permanently incarcerated because the INS cannot find a country to take him." *Id.* at 1023-24.

65. *Id.* at 1027. The district court agreed with the INS, holding that the language of 8 U.S.C. § 1252 and the absence of a time limit on detention suggested that indefinite detention of deportable aliens who are aggravated felons is authorized when: 1) immediate deportation is not possible and 2) the alien has failed to show that he is not a threat to the community or that he will show up at scheduled hearings. *Id.* at 1024-25. Further, the governmental policy of protecting the community from aggravated felons warranted the deprivation of Zadvydas's liberty. *Id.* at 1026. However, the court concluded that once the purpose of detention (to effect deportation) is not achievable in the future, confinement is no longer a temporary measure but that of permanent confinement, and thus unconstitutional. *Id.* at 1027.

66. *Id.*

67. Zadvydas v. Underdown, 185 F.3d 279, 297 (5th Cir. 1999).

community by the detainee, or by the risk of flight of the detainee, so long as good faith efforts to effectuate deportation continued and reasonable parole and periodic review procedures are effectively administered.[68] Zadvydas was detained pursuant to 8 U.S.C. § 1231(a)(6).[69] The U.S. Supreme Court granted Zadvydas's appeal on writ of certiorari.[70]

Kim Ho Ma was born in Cambodia in 1977, and eventually immigrated to the United States at the age of seven.[71] In 1995, at the age of seventeen, Ma was convicted of manslaughter and sentenced to thirty-eight months.[72] Ma served two years of his sentence, and was released into INS custody.[73] Under statute 8 U.S.C. § 1227(a)(2), Ma was classified as an aggravated felon.[74] Ma's conviction made him removable.[75] While under INS custody,[76] the ninety-day removal period expired, yet Ma remained detained because of his criminal involvement.[77]

In 1999, Ma filed a writ of habeas corpus under 28 U.S.C. § 2241 to the Federal District Court for the Western District of Washington.[78] The court held that the Constitution forbids post-

68. *Id.* at 296-97. The court also noted governmental policy plays a significant role in the decision to detain an aggravated felon. *Id.* If deportation is blocked, the alien may commit crimes against the general public, which would have been prevented, had the alien been detained or successfully deported. *Id.* Allowing criminal aliens to remain in the United States is a continuing violation of immigration laws. *Id.* Deportation is the preferred method of ending this violation, but detention is an acceptable alternative to achieving this goal. *Id.* Further, allowing criminal aliens to roam free while efforts are made to complete deportation may result in the disappearance of the criminal aliens within the country, and thus unsuccessful deportation. *Id.*

69. Zadvydas v. Davis, 533 U.S. 678, 684 (2001). This statute authorizes the Attorney General to detain specific aliens beyond the removal period. These aliens are classified under 8 U.S.C. § 1182 and 8 U.S.C. § 1227, and are considered criminal or inadmissible. 8 U.S.C. § 1231(a)(6) (2001).

70. *Zadvydas*, 533 U.S. at 678.

71. *Id.* at 685.

72. *Id.*

73. *Id.*

74. 8 U.S.C. § 1227(a)(2) (2001) (classifying criminal aliens as aggravated felons by their convictions).

75. Ma v. Reno, 208 F.3d 815 (9th Cir. 2000). Further, under 8 U.S.C. § 1231(a)(6), an alien ordered removed under 8 U.S.C. § 1227(a)(2) may be detained by the Attorney General beyond the removal period. 8 U.S.C. § 1231(a)(6) (2001).

76. *Ma*, 208 F.3d. at 819.

77. *Zadvydas*, 533 U.S. at 685. 8 U.S.C. § 1231(a)(6) further authorized this continued detainment. 8 U.S.C. § 1231(a)(6) (2001).

78. *Zadvydas*, 533 U.S. at 685. *See also supra* note 62 (discussing when writs of habeas corpus are available to prisoners).

removal detainment unless there is a reasonable chance of successful deportation.[79] The court then held an evidentiary hearing, concluding that there was no reasonable chance of successful deportation of Ma to Cambodia and ordered Ma released.[80] The Attorney General appealed to the Ninth Circuit, which affirmed and concluded that the statute did not authorize detention beyond a "reasonable time" of the 90-day detention period authorized for removal.[81] The United States Supreme Court granted the government's appeal on writ of certiorari.[82]

B. The Supreme Court's Decision

The Supreme Court vacated and remanded both the Ninth Circuit and the Fifth Circuit decisions.[83] The Court read an implicit limitation into the statute, only allowing the Attorney General to detain an alien beyond the post-removal period for an amount of time reasonably necessary to bring about that alien's removal.[84] The Court further held that the Attorney General was not entitled to indefinitely detain these aliens pending their removal.[85]

79. *Zadvydas*, 533 U.S. at 686. The lack of a repatriation agreement between the United States and a foreign country renders successful deportation almost impossible. *See id.* at 686.

80. *Id.* at 686. The Court held that there was no reasonable chance of deportation to Cambodia based on the nonexistence of a repatriation treaty between the United States and Cambodia. *Id.* at 687.

81. *Id.* The Ninth Circuit explained that the Supreme Court has long held that the court is an interpreter of statutes in accordance with constitutional standards, which is the "paramount principle of judicial restraint." *Ma*, 208 F.2d at 822; United States v. Restrepo, 946 F.2d 654, 673 (9th Cir. 1991). The court held that the statute should be construed as such to avoid constitutional problems. Specifically, a greater specification by Congress is necessary to conclusively justify indefinite detainment. *Id.*

82. *Zadvydas*, 533 U.S. at 678.

83. *Id.* at 702.

84. *Id.* at 689. The court further interpreted reasonable time to be a period of six months. *Id.* at 702. *See also* Matthew E. Hedberg, Note & Comment, *Kim Ho Ma v. Reno: Cloaking Judicial Activism as Constitutional Avoidance,* 76 WASH. L. REV. 669, 672-74 (2001) (discussing the legislative history of the current 1231(a)(6)). *See also infra* Part II.B and accompanying notes.

85. *Zadvydas,* 533 U.S. at 689. However, the Court did not limit the Attorney General's authority with respect to terrorist individuals or other "special circumstances" where indefinite detention may be warranted. *Id.* at 696. Though the Court imposed a six-month time limit, it stated: "This six-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been

The Court's decision was five to four. The opinion, written by Justice Breyer, addressed the major arguments raised by the government.[86] The Court addressed Due Process concerns, the constitutional rights afforded to the detainees, the justification for judicial review, Congress's intent and the history behind 8 U.S.C. § 1231. Finally, the Court focused on the theory of constitutional avoidance, and held that indefinite detention was not warranted and thus imposed the reasonable time standard.[87]

The Court began with the Fifth Amendment, considering the liberty interests of resident aliens.[88] The Court held that unless the detention is ordered in a criminal proceeding with adequate procedural protections, or in specific circumstances in which special justifications outweigh the individual's liberty interest,[89] the

determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

86. First, the Court validated its jurisdiction under 28 U.S.C. § 2241. *See* 28 U.S.C. § 2241(c)(3) (authorizing an individual to claim in federal court that he or she is being held "in custody in violation of the Constitution or laws. . . of the United States"). The jurisdiction of the federal courts was challenged under 8 U.S.C. § 1252(a)(2)(B)(ii), which states that "no court shall have jurisdiction to review" decisions "specified . . . to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii). The distinction here, the Court held, was that the detained aliens were not challenging the Attorney General's exercise of discretion but rather the Attorney General's authority under the post-removal-period detention statute. *Zadvydas*, 533 U.S. at 688.

87. *Zadvydas,* 533 U.S. at 689. Constitutional avoidance is followed when an act of Congress raises a serious doubt as to its constitutionality. Crowell v. Benson, 285 U.S. 22, 62 (1932) (holding when the validity of a congressional act is questioned, and even if doubt of constitutionality is raised, "it is a cardinal principle" of the Court to construe the statute to avoid this constitutional question). *See, e.g.*, Ma v. Reno, 208 F.3d 815, 822 (1999) (following the Supreme Court's holding that interpreting statutes to avoid constitutional questions is the "paramount principle of judicial restraint"); United States v. Xcitement Video, Inc., 513 U.S. 64, 73 (1994) (discussing the role of Congress to pass legislation that is consistent with the Constitution and should be construed as such by the Court). As a result, the Court will determine if a certain construction of the statute may avoid invalidation for unconstitutionality. *Zadvydas,* 533 U.S. at 682; *Crowell*, 285 U.S. at 62; *see also* United States v. Witkovich, 353 U.S. 194, 195, 202 (1957) (construing a limitation into an immigration statute in an effort to avoid constitutional invalidation). *See generally* Maria V. Morris, *The Exit Fiction: Unconstitutional Indefinite Detention of Deportable Aliens,* 23 HOUS. J. INT'L L. 255, 302-03 (2001) (discussing specifically the role of constitutional avoidance with respect to immigration law); Hedberg, *supra* note 84, at 680-81 (discussing the relationship between constitutional avoidance and legislative enactments).

88. "No person shall be . . . deprived of life, liberty or property, without Due Process of law." U.S. CONST. amend. V.

89. *Zadvydas*, 533 U.S. at 690-92; Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (imposing detention on dangerous individuals so long as procedural

detention violates the Due Process Clause.[90] Since the proceeding here was civil and not criminal, the Court examined the justifications behind indefinite detainment.[91]

The statute's purpose is to ensure the appearance of aliens at future immigration proceedings and prevent danger to the community.[92] The Court concluded that the first justification was "weak or nonexistent" because the possibility of removal was so remote.[93] The second justification, however, was stronger. The Court had upheld preventive detention when it applies to especially dangerous individuals accompanied by strict procedural safeguards.[94] The Court concluded that civil confinement extended not only to dangerous individuals but also to other aliens ordered removed for other reasons.[95] Additionally, the Court held,

safeguards exist); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (striking down an insanity-related detention system in which the burden was on the detainee). *See also* United States v. Salerno, 481 U.S. 739, 746 (1987) (holding that detainees are entitled to procedural and substantive Due Process, and establishing a test to evaluate Due Process concerns).

90. *Zadvydas*, 533 U.S. at 690.

91. *Id.*

92. *Id.*

93. *Id. See, e.g.,* Jackson v. Indiana, 406 U.S. 715 (1972) (concluding that when the purpose of detention is no longer possible, detention no longer relates to the purpose for which the individual was detained).

94. *Zadvydas,* 533 U.S. at 691; *see, e.g., Hendricks*, 521 U.S. at 368 (holding that detention for "particularly dangerous individuals" is valid when accompanied by strict procedural safeguards); *Salerno*, 481 U.S. at 747, 750-52 (holding stringent time limitations, proof of dangerousness by clear and convincing evidence and existence of judicial safeguards as sufficient procedural safeguards to accompany pretrial detention). The Court holds that the procedural protections provided in 8 C.F.R. § 241.4 are inadequate because the statute permits indefinite detention without any substantial protection for those whose rights are being infringed. *Zadvydas*, 533 U.S. at 692. *See also* 8 C.F.R. § 241.4 (2001).

95. *Zadvydas*, 533 U.S. at 692. *See also* 8 U.S.C. § 1231(a)(6) (2001) (allowing detainment of individuals ranging from dangerous suspected terrorists to tourist visa violators). In light of the recent terrorist attacks, this authorization by the Court may lead to abuse of discretion, since the INS may detain an individual so long as the foreseeability of removal exists. Additionally, abuse of discretion may result from the classification of certain aliens as terrorist or dangerous, since the Court did not restrict the INS's authority to detain these types of individuals. *See Civil Rights and Anti-Terrorism Efforts: Before the Subcomm. on the Constitution, Federalism and Prop. Rights of the Senate Judiciary Comm.,* 107th Cong. (Oct. 3, 2001) (testimony of David Cole, Professor) (discussing that responsive measures in the United States should be "measured and effective"). Further, statutory sentences may be increased in an effort to keep criminal aliens detained for longer periods of time, subsequently delaying release pending deportation. *See* Stanley Mailman & Stephen Yale-Loehr, *As The World Turns: Immigration Law Before and After Sept. 11,* 226 N.Y. L.J. 3 (Oct. 22, 2001) (discussing the ramifications of September 11 upon

the procedural protection accorded to these detained individuals was inadequate.[96] As a result, the statute authorizing indefinite detention raised a "serious constitutional problem" because the special justifications behind the statute did not outweigh the individual's liberty interest.[97]

In addition, the Court rejected the government's contention that the aliens were not afforded any constitutional rights based on their deportation orders.[98] Rather, the Supreme Court followed the theory of "entry fiction," which affords different aliens different rights based on their status at the border.[99] Held to be resident aliens, both petitioners were entitled to constitutional protection, including Due Process and liberty from physical restraint.[100]

The Court also rejected the government's contention that judicial review was unauthorized, under the plenary power doctrine.[101] Judicial deference, the Court reasoned, is subject to "important constitutional limitations;"[102] thus, the Court is entitled

immigration policies).

96. *Zadvydas*, 533 U.S. at 692. Generally, the procedural safeguards accorded to the detainees begins with administrative proceedings in which the alien incorrectly bears the burden of proving he is not dangerous. *Id.* Further, these proceedings are not entitled to later judicial review. *Id.*; 8 CFR § 241.4(d)(1) (2001) (imposing the burden on the alien of proving that release "will not pose a danger to the community . . . or to the safety of other[s]. . . or a significant flight risk . . . from the United States"). *See supra* Part II.B and accompanying notes examining the procedural protections installed by the INS. *See infra* Part V. and accompanying notes examining the new interim procedures installed since the Court's decision.

97. *Zadvydas,* 533 U.S. at 692. *See Salerno*, 481 U.S. at 752 (establishing the "Salerno" test to examine the constitutionality of detention, by determining whether detention is excessive in relation to the purpose of the deprivation). *See generally* Montague, *supra* note 43, at 1477 (discussing how infringement of alien's fundamental rights must be narrowly tailored to the government's interest).

98. *Zadvydas,* 533 U.S. at 692-93.

99. *Id.* at 693. Territorial boundaries influence the rights afforded to aliens. Those outside the United States are not entitled to constitutional protections available to people that are within the United States' territorial boundaries. *Id.* Once an alien enters the country, the Due Process clause then applies as provided in the Constitution: to all "persons" within the United States, regardless of whether or not their "presence here is lawful, unlawful, temporary or permanent." *Id. See also* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (extending Due Process protection to an alien under final order of deportation). *See supra* Part II. and accompanying notes for a historical examination of Due Process protections for aliens.

100. *Zadvydas,* 533 U.S. at 693.

101. *Id.* at 695. The plenary power doctrine requires judicial deference to the executive and legislative branches with respect to immigration law. *Id.*

102. *Id.* at 696.

to review whether an individual's constitutionally protected rights are being infringed.[103] The government also contended that review was not warranted because, as convicts, the aliens' liberty interests were severely diminished. The Court rejected this position by focusing on the constitutional rights of "persons."[104] The Court concluded that the aliens' liberty interest is strong enough to raise the question of whether the Constitution permits detention that is indefinite and potentially permanent. This prevailing liberty interest authorized judicial review.[105]

Despite being presented with a clear constitutional problem, the Supreme Court also examined the congressional intent and history behind the statute.[106] The Court concluded that statutory silence does not indicate Congress' intent to authorize indefinite detention.[107] Further, if Congress intended to authorize indefinite detainment, the statute would have "spoken in clearer terms."[108]

From a historical perspective, the Court concluded that despite the statute's continuous historical change, Congress has never authorized, nor did it intend to authorize, indefinite and permanent confinement.[109] Ultimately, the Court followed the historical theory of constitutional avoidance, and construed the statute to avoid a constitutional threat.[110] As a result, once the removal of an alien ordered deported is no longer foreseeable, continued detention is no longer authorized by statute.[111]

In this decision, the Court attacked the indefinite detention of aliens who have no likelihood of removal based on repatriation agreements between their native countries and the Untied States. Rather than directly answering the question of whether indefinite detention is constitutional, the Court construed the statute to limit the Attorney General's authority to detain aliens only for a period

103. *Id.*

104. *Id.* at 693. The Court focused on the Fifth Amendment, which forbids the deprivation of liberty to any "person." U.S. CONST. amend. V.

105. *Zadvydas,* 533 U.S. at 696.

106. *Id.* Despite a constitutional problem, if the intent of Congress is clear in the statute, the Court must respect Congress' intent. *Id.* (citing Miller v. French, 530 U.S. 327, 336 (2000)).

107. *Id.* at 697.

108. *Id.* Although the statute states that the Attorney General "may" detain an alien, the Court held this term to be ambiguous and thus did not give the Attorney General unlimited discretion in alien detainment. *Id.*

109. *Id.* at 699.

110. *Id.*

111. *Id.*

reasonably necessary to secure removal.[112] Further, the reasonable time limitation of six months was established in an effort to balance the competing policy concerns of an individual liberty interest and protection of public safety.[113]

C. The Dissent

Three other dissenters joined in part of Justice Kennedy's dissent.[114] They interpreted the Attorney General's statutory authority to detain criminal aliens absent a specified time limit.[115] Justice Kennedy contended that the majority "misunderstands" the theory of constitutional avoidance.[116] Constitutional avoidance

112. *Id.* at 695, 699. In light of recent developments, it is important to note, however, that the Court did not take away the Attorney General's authority to indefinitely detain terrorist or other dangerous aliens when continued detention may be warranted and appropriate. *Id.* at 696; *see also Attorney General Issues Interim Procedure for Post-Order Custody Review After Zadvydas,* 78 INTERPRETER RELEASES 1228 (2001) (discussing the *Zadvydas* decision and the special circumstances warranting continued detention regardless of removal foreseeability).

113. *Zadvydas*, 533 U.S. at 680. According to the Court, reasonableness is measured in terms of the statute's purpose of assuring the alien's presence at the moment of removal. Thus, once removal is no longer foreseeable, detention is unreasonable and no longer authorized by statute. *Id.* at 699. Examining the history of the statute gives specific support to the installation of the six-month time limit. The Immigration Act of 1917 established no time limit to effect deportation, but the Ninth Circuit imposed a four-month "reasonable time" limit. Wolck v. Weedin, 58 F.2d 928, 930-31 (9th Cir. 1932). In 1952, this Act was amended to include a six-month limit on the Attorney General's authority to detain an alien pending deportation. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 166 (1952) (prior to 1990 amendment) (formerly 8 U.S.C. § 1252(c) (1952)). In 1990, 1252(c) was amended, authorizing the Attorney General to detain certain classes of criminal aliens past the reasonable time period of six months. In 1996, the enactment of the AEDPA and IIRIRA repealed previous statutes and contained no reasonable time limitation, authorizing the Attorney General to detain criminal aliens indefinitely. The six-month time limit is thus evidenced in past legislation. Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 5049 (1990) (prior to 1996 amendment) (formerly 8 U.S.C. § 1252 (a)(2)(A)&(B) (Supp. II 1990)).

114. The dissenters in this case were Scalia, Thomas, Kennedy, and Rhenquist. *Zadvydas,* 533 U.S. at 705.

115. *Id.* at 701.

116. *Id.* at 707. Justice Kennedy defined the issue as whether or not the "authorization to detain beyond the removal period is subject to the implied, nontextual limitation that the detention be no longer than reasonably necessary to effect removal to another country." *Id.* He recognized the theory of constitutional avoidance; however, the interpretation the majority adopted "has no basis in the language or structure of the INA and . . . contradicts . . . the purpose set forth in the . . . statutory text." *Id.*

permits courts to choose constructions that are "fairly possible,"[117] but not to extend the construction to the "disingenuous evasion"[118] of the constitutional question presented. Amending the statute to include a reasonable time limit would seemingly contradict the "statutory purpose and design," which authorizes the Attorney General to detain criminal aliens beyond the removal period.[119]

Further, the dissent challenged, examining the statute itself discourages the inclusion of a reasonable time standard.[120] Specifically, § 1231(a)(6) authorizes continued detention to both inadmissible aliens and removable aliens, within the same grant of authority.[121] The majority held that inadmissible aliens "present a very different question"[122] than that of removable aliens.[123] However, the plain meaning of the text does not allow a time limit to be imposed on one class of aliens and not the other.[124] Therefore, Justice Kennedy contended, the authority of the Attorney General to detain criminal aliens beyond the removal period extends to both inadmissible aliens and removable aliens.[125]

Justice Kennedy also addressed the constitutional ramifications associated with the majority holding. First, the judicial judgment challenged the Legislature's power over immigration matters. Second, the judgment also infringed on the Executive's powers of discretion and authority over foreign policy matters, thus "weakening the hand of our Government."[126] Finally, the release of criminal aliens increased deportation difficulties and the threat of risk to surrounding communities, directly contradicting the purpose behind immigration regulation.[127] Ultimately, Part I of the dissent contended that a removable alien lacks the same liberty interest of United States citizens, thus justifying their detention.[128]

117. *Id.* at 707 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).
118. *Id.* at 707; Salinas v. United States, 522 U.S. 52, 60 (1997).
119. *Zadyvdas*, 533 U.S. at 708. According to Justice Kennedy, the statute was "straightforward" and the imposition of a time limit by the majority was unwarranted and improper. *Id.* at 706-07.
120. *Id.* at 707. *See, e.g.*, § 1231(c)(1)(a) and § 1231(c)(3)(A)(ii)(II) (including explicitly "reasonable time" within their statutory construction).
121. *Zadvydas*, 533 U.S. at 708.
122. *Id.* at 682.
123. *Id.*
124. *Id.* at 710.
125. *Id.* at 711.
126. *Id.* at 713.
127. *Id.*
128. *Id.* at 717.

In Part II, Justice Kennedy addressed certain circumstances in which the Court may order an alien's release. He recognized that aliens are entitled to Due Process protections, but subject to limitations and other conditions not applicable to United States citizens.[129] Admission to the United States is a privilege and is conditioned upon compliance with United States laws.[130] Abuse of this privilege and violation of the law by the alien breached the alien's right to remain in the United States.[131] Even so, the dissent concluded, these aliens are entitled to adequate procedural protections and are entitled to be free from arbitrary detention.[132] Denial of these protections infringes upon the alien's rights and permits the alien to seek redress within the judicial system.[133]

Justices Scalia and Thomas dissented from this portion under the theory that removable aliens have no constitutional right to be in the United States. This dissent relied heavily on *Shaughnessy v. United States ex rel. Mezei*.[134] *Mezei* held that removable aliens lack the Due Process right to release in the United States.[135] Further, according to this dissent, this rule should extend to criminal aliens under final order of removal, which is suggestively evident in the statute codified by Congress.[136]

IV. ANALYSIS OF THE COURT'S DECISION

The Court concluded that judicial review was warranted. It rejected the theory of judicial deference, examined the rights afforded to criminal aliens based on the entry fiction doctrine, and explored the procedural protections currently available to detained

129. *Id.* at 718; *see also* Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) (discussing that in its authorization over immigration regulation, "[c]ongress regularly makes rules that would be unacceptable if applied to citizens").

130. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) (upholding the notion that "deportation is necessary in order to bring an end to an ongoing violation of United States law"); INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) (establishing "[t]he purpose of deportation is not to punish past transgressions but rather put an end to a continuing violation of the immigration laws").

131. *Zadvydas*, 533 U.S. at 720.

132. *Id.* at 721. If detention is incident to removal, it is not justified as punishment nor can the confinement or conditions be penal in nature. *Id. See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 238 (1896).

133. *Zadvydas*, 533 U.S. at 723.

134. 345 U.S. 206 (1953).

135. *Zadvydas*, 533 U.S. at 703.

136. *Id.* at 703-05.

aliens. Recognizing that a constitutional issue presented itself, the Court faced two main avenues: address the constitutionality of indefinite detention warranted by the statute, or avoid this constitutional question by interpreting the statute to include a time limitation for detention. The Supreme Court correctly evaluated 8 U.S.C. § 1231(a)(6) under the theory of constitutional avoidance, imposing a six-month time limitation on the Attorney General's detainment authority.

A. Judicial Review is Warranted

1. Plenary Power

The plenary power doctrine enables the legislative and executive branches of government to exercise power with respect to certain policies.[137] This doctrine has been invoked in immigration matters, which are deemed to be issues of foreign policy.[138] Further, the plenary power doctrine requires the judiciary to defer issues of immigration to the other branches of government so long as the bounds of the Constitution are not transgressed.[139] The Court correctly rejected this doctrine based on two grounds: the issue presented is not one of foreign policy and the regulations imposed by the statute presented a constitutional problem.[140]

The purpose of 8 U.S.C. § 1231(a)(6) is to prevent flight of removable aliens and protect the community from dangerous individuals. This is a domestic issue, not one of foreign policy that ordinarily implicates the plenary power doctrine.[141] The Court recognized this difference, stating that when deportable aliens cannot be removed, they are not "condemned to an indefinite term of imprisonment within the United States."[142] The only foreign

137. *See, e.g.*, Hedberg, *supra* note 84, at 684.

138. *Zadvydas*, 533 U.S. at 696.

139. *Id.* *See also* Hedberg, *supra* note 84, at 684 (discussing that absent a constitutional violation, the courts should not overturn proper exercises of plenary power with respect to immigration).

140. *Zadvydas*, 533 U.S. at 695-96; *see also* Chopin, *supra* note 24, at 1297-98.

141. Chopin, *supra* note 24, at 1297-98; Lisa Cox, Comment, *The Legal Limbo of Indefinite Detention: How Long Can You Go?*, 50 AM. U. L. REV. 725, 733-34 (2001) (discussing that plenary power is usually exercised when national security is an issue or when national sovereignty is affected, as in *Mezei*); Montague, *supra* note 43, at 1478 (expelling criminals from the country and preventing further crimes is a domestic concern, not one of foreign policy).

142. *Zadvydas*, 533 U.S. at 695.

policy consideration presented by the government was the concern that the judiciary refrain from interference with repatriation negotiations.[143] The government failed to suggest how a habeas court's efforts in determining the likelihood of repatriation affected these negotiations.[144]

Even if the issue was one of foreign policy, the constitutional issue of indefinite detention of removable aliens prevents judicial deference to the political branches. The role of the judiciary is to ensure that regulations enacted by the executive and legislative branches conform to the standards set forth in the Constitution.[145] All persons within the United States are entitled to Due Process, including removable aliens.[146] The Court concluded that indefinite detention challenged these Due Process rights, and therefore judicial deference was not warranted.[147]

2. Entry Fiction

The Court further examined Due Process rights to determine if Zadvydas and Ma were even entitled to judicial review as resident aliens. The Court correctly examined the entry fiction doctrine. Following *Mezei*, the Court maintained the distinction between removable and inadmissible aliens and their respective rights.[148] Under *Mezei*, indefinite detention of inadmissible aliens is constitutional.[149] However, removable aliens are entitled to both substantive and procedural Due Process rights.[150] Even though it is arguable that aliens lose all of these rights once they commit a crime,[151] common law does not recognize this nor does the

143. *Id.* at 696.

144. *Id.*

145. *Id.* at 689; *see, e.g.*, Hedberg, *supra* note 84, at 684. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the doctrine of judicial review).

146. *Zadvydas*, 533 U.S. at 693.

147. *Id.* at 690.

148. *E.g.*, Shaughnessy v. U.S. *ex rel* Mezei, 345 U.S. 206, 215 (1953).

149. *Id.*

150. *E.g.*, Wong Wing v. United States, 163 U.S. 228, 238 (1896).

151. Failure to comply with these laws renders the alien's right to residence void. *Id.* at 236-37. The right to exclude an alien is a sovereign national right. *Mezei*, 345 U.S. at 210. It is undisputed, however, that once an alien is admitted a government cannot then decide if the alien should be excluded without Due Process. Landon v. Plasencia, 459 U.S. 21, 33 (1982). *See also* Clay McClasin, Comment, *My Jailor is My Judge: Kestutis Zadvydas and the Indefinite Imprisonment of Permanent Resident Aliens by the INS*, 75 TUL. L. REV. 193, 215 (2000).

Supreme Court.[152] Zadvydas, since 1956, and Ma, since 1984, have been permanent resident aliens in the United States.[153] Though their histories have been stained by constant criminal activity, and they are under final orders of deportation, they are nonetheless removable aliens entitled to Due Process protection, including judicial review.

3. Due Process Protection

The Court acknowledged that Zadvydas and Ma were entitled to Due Process protections.[154] These protections are separated into two distinct prongs: procedural and substantive. It has been held in some cases that indefinite detention is warranted so long as adequate procedural protections exist.[155] The Court correctly held that the procedures enacted by the INS were insufficient.[156]

In order to qualify for release under these procedures, the burden of proof incorrectly rested on the alien to show that there was no threat to the community nor did the risk of flight exist. Further, even if the government found that the alien satisfied the burden, release was still within the Attorney General's discretionary authority. This authority was final; judicial review was not authorized.[157] Though the INS attempted to remedy these procedural inadequacies in the Pearson Memorandum, the interim procedures were insufficient.[158] These procedural defects warranted judicial review.

Unfortunately, the Court circumvented the issue of substantive Due Process. Instead of attacking indefinite detention as unconstitutional, the Court interpreted the statute to avoid this constitutional defect.[159] This interpretation imposed a six-month reasonable time limit on detention of removable aliens awaiting deportation.[160] Implicitly, the Court created substantive Due

152. *Wong Wing*, 163 U.S. at 228. *See supra* Part II.A and accompanying notes.
153. *Zadvydas*, 533 U.S. at 684.
154. *Id.* at 694.
155. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 755 (1987).
156. *Zadvydas*, 533 U.S. at 701. Though enacted by the INS to supplement 8 U.S.C. § 1231(a)(6), 8 C.F.R. § 241.4 is insufficient in comparison to the deprivation of liberty. *Id.* at 692.
157. 8 C.F.R. § 241.4(d)(1) (2001); Capitaine, *supra* note 12, at 780-81.
158. Pearson, *supra* note 46; Capitaine, *supra* note 12, at 781-82 (discussing the procedures introduced in the Pearson Memorandum).
159. *Zadvydas*, 533 U.S. at 690.
160. *Id.* at 701.

Process rights for aliens not thought to exist before.[161]

Even though it was not a direct constitutional ruling, the statutory interpretation was cognizant of basic constitutional norms. Indefinite detention of resident aliens infringes upon the fundamental right of liberty.[162] When a constitutional issue presents itself, the Court may not defer to another political branch.[163] The Court followed *Mezei* and recognized Zadvydas and Ma as resident aliens, entitled to Due Process under the Constitution. Further, even though these aliens were criminals, their Due Process rights were not diminished.[164] "Irrespective of the procedures used," the Court held that the aliens' liberty interests are strong enough to question the constitutionality of indefinite detention.[165] However, the Court did not apply the substantive Due Process standard but followed constitutional avoidance.

If the Court had applied the substantive Due Process test, it likely would have found that indefinite detention is unconstitutional. To analyze substantive Due Process rights, the Court must evaluate: 1) the right being asserted; 2) whether or not this right is fundamental; 3) and if so, whether detainment is justified to serve a compelling government interest.[166] Further, the regulatory means must not be excessive in serving the governmental interest.[167]

Petitioners contend that their fundamental liberty interests are

161. Marcia Coyle, *Supreme Court Trims Congress' Sails on Immigration Control*, 76 MIAMI DAILY BUS. REV. 22 (July 11, 2001) (discussing the Court's refusal to defer immigration matters to other branches, and ultimately limiting Congress' power to control immigration even when anti-immigration sentiments are high).

162. *See, e.g.,* United States v. Salerno, 481 U.S. 739, 755 (1987).

163. *E.g.,* Hedberg, *supra* note 84, at 684.

164. *Zadvydas*, 533 U.S. at 696.

165. *Id.* The government disagreed that review was warranted based on plenary power, entry fiction, procedural Due Process and substantive Due Process. *Id. See also* Foucha v. Louisiana, 504 U.S. 71 (1992) (prohibiting certain government actions notwithstanding the fairness of the procedures used and discussing that an individual's liberty interest is the most basic and essential liberty). Further, *Foucha* and *Salerno* together exemplify the Due Process standard for claims of unconstitutional infringement on the right to be free from physical restraint. *Foucha*, 504 U.S. at 71; *Salerno*, 481 U.S. at 739. However, rather than evaluate the petitioners' claim in light of this standard, the Court followed the theory of constitutional avoidance. Acosta, *supra* note 14, at 1380, 1387-94.

166. *Salerno*, 481 U.S. at 750-52 (discussing whether detention is excessive in relation to the purpose for the liberty deprivation).

167. *Foucha*, 504 U.S. at 86; *Salerno*, 481 U.S. at 752*;* Acosta, *supra* note 14, at 1377.

being infringed. *Foucha* established three circumstances in which the government's interest outweighs the individual's liberty interest: 1) punitive detainment of convicted criminals; 2) psychiatric civil detainment if an individual is mentally ill and dangerous to self and community; and 3) detainment of potentially dangerous persons in narrowly prescribed circumstances.[168] Here, the question is whether the indefinite detention is a legitimate means to ensure the government's efficient execution of removal. As the Court found, once deportation is unlikely, the government lacks the compelling interest to continually detain the individual.[169] Further, if detention is indefinite, it cannot constitute the least regulatory means of achieving efficient enforcement of deportation laws, because eventually the individual's interest outweighs any governmental interest.[170] Therefore, indefinite detention is a violation of substantive Due Process and thus is unconstitutional.[171]

B. Statutory Interpretation

1. Traditional Interpretation

The Supreme Court has long held that courts should interpret statutes in a manner that avoids deciding substantial constitutional questions.[172] There are many approaches to statutory interpretation.[173] The traditional approach, or plain meaning rule, requires the court to look at the statute's history, underlying policy and structure.[174] As a result, the courts should not alter the statute by reading words or elements into the statute that are not explicitly

168. *Foucha*, 504 U.S. at 80-83; Acosta, *supra* note 14, at 1380.

169. *Zadvydas*, 533 U.S at 690. The government does maintain a compelling interest to maintain control over borders and ensure safety within its jurisdiction. However, this does not justify indefinite detention. Nor should courts assume that Congress implicitly intended such a denial of Due Process. Montague, *supra* note 43, at 1486.

170. *See Zadvydas,* 533 U.S. at 690.

171. *See generally* Acosta, *supra* note 14, at 1391-94 (discussing a substantive Due Process analysis of *Zadvydas*).

172. United States v. Restrepo, 946 F.2d 654, 673 (9th Cir. 1991) (stating that this is the "paramount principle of judicial restraint"), *cert. denied*, 503 U.S. 961 (1992).

173. *See* Hedberg, *supra* note 84, at 680-84 (discussing the history of the Immigration and Nationality Act and the theories behind statutory interpretation).

174. *See id.*

present. Ultimately, a court may not redraft a statute.[175] Here, if the Court had followed this theory, the statute would lack the time limitation because it is not explicitly present.

2. Judicial Deference

Judicial deference requires that if the statute is silent or ambiguous, the judiciary is not to impose an interpretation of a statute over the interpretation of a governmental branch, especially if the branch has more expertise within the specific area.[176] This is founded on the belief that appointed agencies are better positioned to make specific decisions.[177] However, this deference is only warranted if there is no constitutional violation.[178] The Court could not follow this theory because of the Due Process transgressions.

3. Constitutional Avoidance

Instead, the Court followed constitutional avoidance. This theory is founded on the concern that constitutional issues should be addressed only when necessary.[179] Fundamentally, Congress is bound by a duty to uphold the Constitution, and therefore, courts should presume that legislative enactments are intended to adhere to constitutional requirements.[180] This theory is followed when plain language is ambiguous, but is not a "license for the judiciary to rewrite the language" of the legislature.[181] Further, this theory may not be used as a "disingenuous" attempt to avoid constitutional questions.[182] However, by examining the statute's history and the existence of time limitations in previous enactments, the Court correctly construed a six-month time limitation into the statute. Through the addition of this time limitation, the Court avoided unnecessarily addressing the constitutionality of indefinite detainment. The Court has a duty to evaluate the constitutionality

175. *See id.*
176. *See id.* at 681-82.
177. *See id.* at 682.
178. *See id.* at 684.
179. *See id.* at 681.
180. *See id.*
181. *See id.; see, e.g.*, United States v. Albertini, 472 U.S. 675, 680 (1985) (discussing the theory of constitutional avoidance).
182. Hedberg, *supra* note 84, at 681; George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933) (Cardozo, J.) (discussing limitations on constitutional avoidance).

of legislative enactments; the legislature is bound to uphold the constitution. Constitutional avoidance best follows this presumption. This interpretation prevented the invalidation of the statute, maintaining the Attorney General's authority but restricting it to constitutional limitations.[183]

C. The Impact of the Decision

Though this decision specifically applies to removable resident aliens,[184] it has had mixed application to inadmissible aliens. The Sixth Circuit, interpreting *Zadvydas*, has held that the indefinite detention of inadmissible aliens is constitutional.[185] Conversely, a divided panel of the Ninth Circuit extended *Zadvydas* to apply to inadmissible aliens.[186] The majority on that panel noted that 8 U.S.C. § 1231 (a)(6) does not draw a distinction between removable and inadmissible aliens, and therefore *Zadvydas* applies to all categories of aliens covered by the statute.[187] Thus, the Supreme Court will have to address the constitutionality of indefinite detention of inadmissible aliens in the future.

This decision is not without ramifications, most of which will be felt in the United States. As Justice Kennedy passionately stated, this decision will "ensure these dangerous individuals, and hundreds more like them, will remain free."[188] First, requiring the INS to release these aliens strips the government of its

183. If the Court would have followed the dissent by deciding that the statute authorized indefinite detainment, then the constitutional issue could not have been avoided. As a result, the statute would be declared unconstitutional, removing the Attorney General's authority to detain. *See* Coyle, *supra* note 161.

184. Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

185. Carballo v. Luttrell, 2001 WL 1194699 (6th Cir. Oct 11, 2001) (overruling Rosales-Garcia v. Holland, 238 F.3d 704 (6th Cir. 2001)). Carballo specifically applied to the indefinite detention of Mariel Cubans. *Id.*; "Ninth Circuit Holds Indefinite Detention of Inadmissible Aliens Not Permissible Under *Zadvydas*," IMMIGRATION BUS. NEWS. & COMMENT DAILY 42 (Oct. 3, 2002).

186. Xi v. INS, 298 F.3d 832 (9th Cir. 2002). The court specifically noted that its decision does not extend to detained terrorists, which is governed by the PATRIOT Act. *Id.* at 839.

187. *Id.* at 836; *but see* Morales v. Conley, 224 F.Supp.2d 1070 (S.D. W. Va. 2002) (distinguishing from *Zadvydas* because *Morales* was inadmissible and has been since 1992, and *Zadvydas* does not apply to aliens excluded before 1997); Gomez v. Benov, 2002 WL 31261162 (N.D. Cal. Oct. 3, 2002) (declaring 8 U.S.C. § 1231 (a)(6) inapplicable to aliens determined inadmissible prior to October 30, 1996, as the IIRIRA was not enacted (and thus the previous codified INA applied)).

188. *Zadvydas*, 533 U.S. at 716 (dissenting).

constitutionally guaranteed power to establish a uniform rule of naturalization. It makes a "mockery" of the Constitution.[189] It allows aliens which the government wishes to exclude to remain free within the United States. This ultimately results in lost control over territorial borders, which is an inherent national sovereign power.[190]

Second, it detrimentally affects foreign policy and repatriation negotiations. Rather than encourage international agreement, the decision conveys to foreign nations that the United States will take any and all immigrants.[191] It results in the release of violent criminals simply because their country of origin "refuses to live up to its obligations under international law."[192] It creates less incentive for removable aliens to facilitate expeditious removal to their home countries, and it encourages aliens to not cooperate so that deportation is not deemed foreseeable.[193]

Third, release of these aliens may increase crime, rather than prevent it. If aliens are not detained, they may commit crimes against the general population, which they would not have been able to commit had they been detained.[194] Additionally, releasing an alien pending deportation increases the risk of unsuccessful deportation, because it is likely that the alien will disappear into the country, frustrating the process.[195]

Despite these ramifications, ultimately, and most importantly, the Court affirmed the very core of our system of justice, Due Process. Prior to the *Zadvydas* decision, over 3,500 aliens who had already served criminal sentences remained detained mainly because their countries of origin had no diplomatic ties with the

189. *E.g.,* Daniel R. Dinger, *When We Cannot Deport, Is It Fair to Detain? An Analysis of the Rights of Deportable Aliens Under 8 U.S.C. § 1231 (a)(6) and the INS Interim Procedures Governing Detention,* 00 BYU L. REV. 1551, 1589-90 (2000).

190. *See id.*; Montague, *supra* note 43, at 1486.

191. *Zadvydas*, 533 U.S. at 711; *see* Dinger, *supra* note 189, at 1590.

192. Post-Order Custody Review after Zadvydas v. Davis, 8 C.F.R. § 241 (2001).

193. *Zadvydas*, 533 U.S at 713.

194. Zadvydas v. Underdown, 185 F.3d 279, 296 (5th Cir. 1999).

195. *Id.* at 297. Justice Kennedy's dissent also stated that the ruling causes a "systemic dislocation in the balance of powers, thus raising serious constitutional concerns not just for the cases at hand but for the Court's own view of its proper authority." *Zadvydas,* 533 U.S. at 705. Further, "this rule . . . invites potentially perverse results." *Id.* at 715. Specifically, he noted that other nations may bar admission of certain criminal aliens, thus resulting in release of these aliens into the United States. *Id. See generally* Morris, *supra* note 87, at 293-96 (defining the governmental interests behind detainment).

United States.[196] As a result of 8 U.S.C. § 1231(a)(6), the Attorney General was authorized to indefinitely detain these individuals until deportation was effectuated.[197] This decision has affected most of these detained aliens, granting them greater review opportunities and release. Further, the decision reflects that the interests of the United States must be balanced against global realities. It promotes international law-making and global cooperation, while maintaining a priority for individual rights and global interests. Ultimately, it suggests an aspiration for justice and fairness to all.[198]

V. CONCLUSION

The Supreme Court correctly read an implicit time limitation into 8 U.S.C. § 1231(a)(6), limiting the Attorney General's authority to detain a criminal alien to six months. Following the decision, the Attorney General immediately ordered the INS to adopt new procedures to take effect July 31, 2001.[199] On August 2, 2001, a new bill was introduced to the House of Representatives, entitled the Immigrant Fairness and Restoration Act of 2001. The purpose of this act is to amend the Immigration and Nationality Act, and "to modify restrictions added by the Illegal Immigration Reform and Immigration Responsibility Act of 1996."[200] On August 7, 2001, the State Department declared its plans to assist the INS in

196. Chopin, *supra* note 24, at 1262.

197. 8 U.S.C. § 1231(a)(6) (2001).

198. Noah Benjamin Novogrodsky & Urs Cipolat, *Justice Goes Global: Are We Finally Moving Beyond National Interests?*, THE RECORDER 138 (July 18, 2001).

199. Post-Order Custody Review after Zadvydas v. Davis, 66 Fed. Reg. at 38,433 (July 24, 2001) (codified at 8 C.F.R. § 241). The Attorney General specifically required that the new procedures provide regulations for determining the likelihood of removal, ramifications for failure to comply with the regulations, and also required special regulations to be enacted in specific circumstances, such as for terrorists or other dangerous individuals. In the interim, the Attorney General provided procedures to be followed until the INS had adopted regulations in light of *Zadvydas*. *Id.*

200. H.R. 2772, 107th Cong., (2001). Specifically, the Act required judicial review of immigration orders and amended 8 U.S.C. § 1231(a)(6). The amendment included a provision that detention shall not exceed reasonable time, "not to exceed 9 months." It also required continued review by the Attorney General every 90 days following the removal period. Ultimately, these decisions are subject to *de novo* review by an immigration judge and administrative appeal, and the burden is upon the Attorney General to prove that continued detention is authorized. *Id.* §§ 8(c)-(d). As of October 10, 2001, the Bill remained stagnant in the House Judiciary committee. The Bill was reintroduced by Rep. Conyers in H.R. 3894, 107th Cong. (2002) (entitled Restoration of Fairness in Immigration Act of 2002).

the repatriation of detained criminal aliens. Specifically, the State Department will continue its diplomatic efforts to "enhance [their] cooperation with host governments."[201]

However, in light of the terrorist attacks on September 11, the progress of this bill has slowed and the Attorney General's authority has increased to protect the United States. On October 2, 2001, the USA PATRIOT Act (Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act) was introduced and passed by Congress.[202] To specifically conform to the *Zadvydas* decision, the Act included an amendment that would require release after six months of any alien whose removal to another country could not be effected in the foreseeable future. However, the release could not "jeopardize the national security of the U.S., or the safety of an individual or community."[203] This amendment shows Congress' attempt to respect the *Zadvydas* decision, however, implementation is a different story.[204] It is possible that the discretion of the Attorney General will not be challenged with respect to criminal aliens.

In fact, this underlying principle of justice has already been thwarted since September 11. In an attempt to preserve "the precious Bill of Rights,"[205] the Attorney General has "rounded up" thousands of immigrants and detained them in "secret custody."[206] Being held as "material witnesses," they are being detained indefinitely by the government.[207] This seems to directly contradict the *Zadvydas* decision and its reaffirmance of the extension of Due

201. *State Dept. Plans to Assist INS in Repatriating Detained Criminal Aliens After Zadvydas*, 78 No. 31 INTERPRETER RELEASES, 1314 (Aug. 13, 2001) (stating that the "bottom line is that . . . we must intensify [U.S. Government] efforts to convince countries to fulfill their obligations to accept return of their nationals").

202. H.R. 2975, 107th Cong. 2001.

203. *See Antiterrorism Legislation Gains Momentum in Both Chambers; LawMakers Offer Assorted Stand-Alone Bills*, 78 No. 39 Interpreter Releases 1591 (October 8, 2001).

204. *Civil Rights and Antiterrorism Efforts: Testimony of Professor David Cole on Civil Liberties and Proposed Antiterrorism Legislation Before the Subcommittee on the Constitution, Federalism and Property Rights of the Senate Judiciary Committee*, 107th Cong. (Oct. 3, 2001) (discussing the Bush Administration's proposal of new law enforcement powers as "unnecessarily sacrific[ing] our commitment to both equal treatment and political freedom," and the PATRIOT Act's attempt to mitigate some aspects of this proposal but failing and remaining unconstitutional).

205. Nat Hentoff, *Round Up the Usual Suspects; FBI is Trampling All Over the Bill of Rights*, WASH. TIMES, Oct. 29, 2001, at A21.

206. *Id.*

207. *Id.*

Process to all persons.[208]

If *Zadvydas* were decided this term, it is doubtful that the same conclusion would be reached.[209] Case law holds that in times of war or insurrection, the government has full authority to detain individuals believed to be dangerous.[210] National security is of heightened concern, which undoubtedly affects the Court's decisions. Specifically, a compelling governmental interest clearly exists to protect the United States. from further terrorist attacks; thus, detainment of criminal aliens may be justified.[211] Again, in the current climate, it is likely that *Zadvydas* would have been decided differently.[212]

The United States has had an "open door" policy since its inception.[213] A core principle of this great nation is the right to life, liberty and the pursuit of happiness. Balancing the inherent right

208. *Id.*

209. Lyle Denniston, *Detentions in Terror Probe May Reach Supreme Court*, BOSTON GLOBE, Sept. 30, 2001, at A9 (discussing that focus by the Court on civil liberties "may be sharply curtailed" and increased deference given to government officials). Justice O'Connor stated "we're likely to experience more restrictions on our personal freedom than has ever been the case before." *Id.*

210. United States v. Salerno, 481 U.S. 739, 748 (1987); *see also* Ludecke v. Watkins, 335 U.S. 160 (1948) (approving unreviewable executive power to detain enemy aliens in times of war).

211. *But see Civil Rights and Anti-Terrorism Efforts: Testimony of Professor David Cole on Civil Liberties and Proposed Anti-Terrorism Legislation Before the Subcommittee on the Constitution, Federalism and Property Rights of the Senate Judiciary Committee,* 107th Cong. (Oct. 3, 2001). The assurance of safety both home and abroad is of heightened concern since the terrorist attacks. However, a legal response should be "measured and effective." *Id.* Professor Cole contends that three principles must guide the United States' response to terrorism: prevention of overreaction, maintenance of the "bedrock foundations" of the constitution (freedom and equal treatment), and establishment of a balance between liberty and security, without sacrificing vulnerable minority liberties. *Id.* Legislative enactments must reflect these principles. *Id.* It is said that in battling terrorism, we are fighting for our "commitment to freedom;" this need not be traded to maintain security. Cole concludes, "[M]aintaining our freedoms is itself critical to maintaining our security." *Id.*

212. Tony Mauro, *Business as Usual as Possible: the Supreme Court Raises the Curtain on a Term that has been Touched by the Near War-Time Footing of the Nation's Capital*, 166 N.J. L.J. 1 (2001) (discussing how war has found its way onto the Court's docket, and that issues presented during times of conflict are usually "colored by wartime sensibilities"). Susan Herman, a Brooklyn Law School Professor and General Counsel of the American Civil Liberties Union, stated "[l]ast year's docket would have been tremendously affected," emerging differently in a wartime perspective. *Id.*

213. *See* Mailman, *supra* note 95, at 3 (discussing more restrictive immigration measures, upcoming legislation, and the idea of keeping out terrorists without shutting U.S. borders).

of the individual with compelling governmental interests, the Court correctly decided that when deportation of a resident criminal alien is not foreseeable, indefinite detention is not warranted. So long as the government enacts effective procedures and abuse of discretion is reviewed, both the rights of individuals and the right of this nation to protect its citizens can best be achieved. Eventually, the Court will have to directly face the constitutionality of indefinite detention.[214] It will be interesting to see how the core principle of American justice, freedom, will be sustained.

214. The decision did not directly address the constitutionality of indefinite detention. "It's a good decision, but it was only on statutory grounds . . . there needs to be much more clarification in the case." John Council & Jonathan Ringel, *Immigrants Can't Linger in Limbo Indefinitely*, 17 TEX. L. 18 (July 9, 2001).